IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JAY GUNDERSON, ROSLYN GUNDERSON, et al., Plaintiffs, vs. ADM INVESTOR SERVICES, INC., et al., Defendants.	No. C96-3148-MWB **MEMORANDUM OPINION AND ORDER REGARDING DEFENDANT ADM INVESTOR SERVICES, INC.'S MOTION TO DISMISS**
GARY HOOVER, MARILYN HOOVER, et al., Plaintiffs, vs. ADM INVESTOR SERVICES, INC., et al., Defendants.	C96-3151-MWB

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I. INTRODUCTION

This case arises from hedge-to-arrive contracts ("HTAs"), contracts for the sale and purchase of grain, that were entered into by grain producers and grain elevators. On June 14, 1996, case No. C96-3148-MWB (*Gunderson*), was filed in the United States District Court for the Northern District of Illinois. Plaintiffs in *Gunderson* are a group of grain producers seeking declaratory judgment and other relief as described in greater detail

below.[1] Plaintiffs alleged, *inter alia*, that defendants engaged in the promotion and marketing of HTAs in violation of the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*[2] Also on June 14, 1996, case No. C96-3151-MWB (*Hoover*), which likewise seeks declaratory judgment and other relief, was filed in the United States District Court for the

[1]The following individuals and entities were named as plaintiffs in the original complaint in *Gunderson*: Jay Gunderson and Roslyn Gunderson; Dan Abels; Agcel, Inc.; Asa-Brandt, Inc. a/k/a Asa-Brandt Partnership; Philip Asa; Keith Brandt; Robert Becker; Les Beekman; Ron Berschman d/b/a Phoenix Farms; Steve Berschman; SJMC, Corp.; Dennis Cink; Daryl Cushman; Davids Farms, Inc.; Duane Davids; Dale Kramersmeier and Diana Kramersmeier; Daniel DeWaard; Duane DeWaard; Laurence Doden; M & J Ennen Farms, Inc.; Ronny Ennen; Beverly Everett; Richard Gardner; Jerry Giesking; Rande Giesking; David Gerber; Hamilton County Land Corp.; Bruce A. Heetland; Heidecker Farms, Inc.; Steve Heyer; James L. Hofbauer; Ted Hoover; Janice Hoover; Jerry D. Johnson; Junkmeier Farms, Inc.; Ray Lichter; Tom Lichter; Lichter Brothers; Bradley Loucks; Bruce Meinders; Dale Meinders and Garry Meinders d/b/a Meinders Brothers; J & K Oftedahl, Inc.; John Oftedahl; Edward A. Otis; Jim Otis; Pitkin Farms, Ltd.; Jeff Pitkin; Sandale Farms, Inc.; Ronald Schmidt; Debra Schmidt; Schutjer Bros., Inc. f/k/a Schutjer Brothers; Dennis Schutjer; Reginald Schutjer; Wendell Schutjer; Steve Shortenhaus; Shawn Thomsen; Bill Walstead; Joyce Walstead and Cecil Welhousen.

[2]Named as defendants in the original *Gunderson* complaint were: ADM Investor Services, Inc., ("ADM") a futures commissions merchant registered with the Commodity Futures Traders Commissions ("CFTC"); FAC-MARC, Inc. ("FAC-MARC"), a commodity trading advisor registered with the CFTC; Agri-Plan, Inc., ("Agri-Plan") and Competitive Strategies for Agriculture, Ltd. ("CSA"), both registered with the CFTC as introducing brokers of ADM; Farmers Cooperative Company ("Farmers Co-op"); Farmers Cooperative Elevator d/b/a Titonka Farmers Cooperative ("Titonka"); Farmers Cooperative Elevator of Buffalo Center, Iowa ("Buffalo Center"); The Farmers Co-Operative Society ("FCS"); West Bend Elevator Company ("West Bend"); Farmers Cooperative Elevator, Woden, Iowa ("FCE"); Bode Cooperative ("Bode Co-op"); Cylinder Cooperative Elevator Company ("Cylinder Co-op") and Cooperative Grain & Product Company ("Cooperative Grain"). Defendants Farmers Co-op, Titonka, Buffalo Center, FCS, West Bend, FCE, Bode Co-op, Cylinder Co-op and Cooperative Grain are all Iowa grain elevators.

Northern District of Illinois by a second group of grain producers.[3] Both the original complaints in *Gunderson* and *Hoover* asserted the same thirteen claims for relief.[4]

All of the grain producers will be referred to herein collectively as the Producers. The defendants will be referred to collectively as the defendants, unless otherwise indicated. Defendants Farmers Co-op, Titonka, Buffalo Center, FCS, West Bend, FCE, Bode Co-op, and Cylinder Co-op will be referred to collectively as the Grain Elevators.

On September 25, 1996, the Honorable Suzanne B. Conlon, United States District

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[3]The following grain producers were named as plaintiffs in the original *Hoover* complaint: Gary Hoover and Marilyn Hoover; Ronald L. Broderson; Edward Noonan; Noonan Farms, Inc.; John Olson and Philip Olson d/b/a Olson Farm; and Clarence Miller and Christian Miller d/b/a C & C Miller Farms. The following entities were named as defendants in the original *Hoover* complaint: ADM; FAC-MARC; Agri-Plan; CSA; Titonka; Buffalo Center; West Bend and FCE.

[4]Both the original complaints in *Gunderson* and *Hoover* contained the following claims: Count I alleges a RICO violation, under 18 U.S.C. § 1962(d), by ADM; Count II alleges a RICO violation, under 18 U.S.C. § 1962(d), by ADM, FAC-MARC, Agri-Plan, and CSA; Count III alleges a RICO violation, under 18 U.S.C. § 1962(a), by ADM, FAC-MARC, Agri-Plan, and CSA; Count IV alleges fraud in violation of § 4b of the CEA, 7 U.S.C. § 6b, against ADM and CSA; Count V alleges that the HTAs are illegal because they violate §§ 4(a) and 4(d) of the CEA, 7 U.S.C. §§ 6(a) and 6(d). Count VI seeks declaratory judgment of the rights of the parties to the HTAs, a declaration that the HTAs are illegal, void, and unenforceable, because they violate §§ 4(a)-(c) of the CEA, 7 U.S.C. §§ 6(a)-(c), § 2(1) of the Securities Act of 1933, 15 U.S.C. § 77b(1), and § 3(a)(10) of the Securities Act of 1934, 15 U.S.C. § 78c (a)(10); Count VII alleges fraud in violation the Illinois Consumer Fraud and Deceptive Trade Practices Act ("IDTPA"), 815 ILCS 505/2(5), against ADM; Count VIII alleges a state-law claim for rescission or cancellation of the contracts on the ground of fraudulent misrepresentations; Count IX alleges a state-law claim for breach of fiduciary duty against ADM and CSA; Count X alleges a state-law claim for breach of fiduciary duty against defendant grain elevators; Count XI alleges a state-law claim of fraudulent misrepresentation against ADM, FAC-MARC, Agri-Plan, and CSA. Count XII alleges a state-law claim for breach of contract against the defendant Grain Elevators. Count XIII alleges a state-law claim for negligence against the defendant Grain Elevators.

Court Judge for the Northern District of Illinois transferred *Gunderson* to the Northern District of Iowa. On October 3, 1996, the Honorable James H. Alesia, United States District Court Judge for the Northern District of Illinois, transferred *Hoover* to the Northern District of Iowa.

Defendants ADM and the Grain Elevators subsequently moved for dismissal of the Producers' claims on a number of grounds. On April 17, 1997, the court entered its ruling on defendants' motions to dismiss and found, *inter alia*, that the Producers' CEA fraud claims had not been pleaded with sufficient particularity. The court also concluded that it did not need to consider at that time defendants' various challenges, pursuant to Federal Rule of Civil Procedure 12(b)(6), to the adequacy of other claims asserted by the Producers, because repleading of the fraud claims, either by amendment or by refiling, was necessary in both cases. The court therefore granted defendants' motions to dismiss in each case to the extent that it found the claims of fraud inadequately pleaded under Federal Rules of Civil Procedure 9(b) and 12(b)(6). The Producers were directed to file an amended complaint adequately pleading fraud pursuant to Federal Rule of Civil Procedure 9(b). The court further held that such an amended complaint might also rectify any inadequacies perceived in the pleading of other claims, and therefore the Producers would be permitted to replead each count.

On May 20, 1997, the court consolidated *Gunderson* and *Hoover*. On June 10, 1997, the Producers filed their First Amended Complaint in the consolidated case.[5] The First Amended Complaint contained fifteen claims.[6] Defendant ADM and the Grain Elevators

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[5]All defendants named in the original complaint, except Cooperative Grain, were again named as defendants in the First Amended Complaint.

[6]The First Amended Complaint contained the following fifteen claims: Counts I and II alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), (continued…)

again sought the dismissal of all claims asserted against them in the First Amended Complaint. Among the grounds for dismissal asserted by defendants was the argument that the Producers had again failed to plead fraud with the particularity required by Federal Rule of Civil Procedure 9(b). On March 31, 1998, the court entered its ruling on defendants' motions to dismiss and again found, *inter alia,* that the Producers' CEA fraud claims had not been pleaded with sufficient particularity. The court further concluded that it did not need to consider at that time defendants' remaining challenges, pursuant to Federal Rule of Civil Procedure 12(b)(6), to the adequacy of other claims asserted by the Producers, because repleading of the fraud claims, either by amendment or by refiling, was necessary in both cases. The court therefore again granted defendants' motions to dismiss in each case to the extent that it found the claims of fraud inadequately pleaded under Federal Rules

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[6](…continued)
under 18 U.S.C. § 1962(c), by ADM, CSA, FAC-MARC, and Agri-Plan; Count III alleged a RICO violation, under 18 U.S.C. § 1962(c), by Titonka; Count IV alleged a RICO violation, under 18 U.S.C. § 1962(c), by ADM; Count V alleged fraud in violation of § 4b of the Commodity Exchange Act ("CEA"), 7 U.S.C. § 6b, against ADM and CSA; Count VI alleged that the HTAs are illegal because they violate §§ 4(a) and 4(d) of the CEA, 7 U.S.C. §§ 6(a) and 6(c); Count VII sought declaratory judgment of the rights of the parties to the HTAs, a declaration that the HTAs are illegal, void, and unenforceable, because they violate §§ 4(a)-(c) of the CEA, 7 U.S.C. §§ 6(a)-(c), § 2(1) of the Securities Act of 1933, 15 U.S.C. § 77b(1), and § 3(a)(10) of the Securities Act of 1934, 15 U.S.C. § 78c (a)(10); Count VIII alleged a violation of the CEA, 7 U.S.C. § 6d, by the defendant grain elevators; Count IX alleged a violation of the CEA, 7 U.S.C. § 6o(1), by Titonka, FCE, Bode Co-op, Buffalo Center, West Bend, Cylinder Co-op, FCS and Farmer's Co-op; Count X alleges a state-law claim for recission of the HTA contracts against defendant Grain Elevators; Count XI alleges a state-law claim of breach of fiduciary duty against ADM, FAC-MARC, Agri-Plan, and CSA; Count XII alleges a state-law claim for breach of fiduciary duty against the defendant Grain Elevators; Count XIII alleges a state-law claim of fraudulent misrepresentation against ADM, FAC-MARC, Agri-Plan, CSA and Titonka; Count XIV alleges a state-law claim for breach of contract against the defendant Grain Elevators; Count XV alleges a state-law claim for negligence against the defendant Grain Elevators.

of Civil Procedure 9(b) and 12(b)(6). The Producers were directed to file a second amended complaint adequately pleading fraud pursuant to Federal Rule of Civil Procedure 9(b).

On May 28, 1998, the Producers filed their Second Amended Complaint in the consolidated case.[7] The Second Amended Complaint asserts the following fifteen claims: Counts I and II allege violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), under 18 U.S.C. § 1962(c), by ADM, CSA, FAC-MARC, and Agri-Plan; Count III alleges a RICO violation, under 18 U.S.C. § 1962(c), by Titonka; Count IV alleges a RICO violation, under 18 U.S.C. § 1962(c), by ADM; Count V alleges fraud in violation of § 4b of the Commodity Exchange Act ("CEA"), 7 U.S.C. § 6b, against ADM and CSA; Count VI alleges that the HTAs are illegal because they violate §§ 4(a) and 4(d) of the CEA, 7 U.S.C. §§ 6(a) and 6(c); Count VII seeks declaratory judgment of the rights of the parties to the HTAs, a declaration that the HTAs are illegal, void, and unenforceable, because they violate §§ 4(a)-(c) of the CEA, 7 U.S.C. §§ 6(a)-(c), § 2(1) of the Securities Act of 1933, 15 U.S.C. § 77b(1), and § 3(a)(10) of the Securities Act of 1934, 15 U.S.C. § 78c (a)(10); Count VIII alleges a violation of the CEA, 7 U.S.C. § 6d, by the defendant grain elevators; Count IX alleges a violation of the CEA, 7 U.S.C. § 6o(1), by Titonka, FCE, Bode Co-op, Buffalo Center, West Bend, Cylinder Co-op, FCS and Farmer's Co-op; Count X alleges a state-law claim for recission of the HTA contracts against defendant Grain Elevators; Count XI alleges a state-law claim of breach of fiduciary duty against ADM, FAC-MARC, Agri-Plan, and CSA; Count XII alleges a state-law claim for breach of fiduciary duty against the defendant Grain Elevators; Count XIII alleges a state-law claim of fraudulent misrepresentation against ADM, FAC-MARC, Agri-Plan, CSA and Titonka; Count XIV alleges a state-law claim for breach of contract against the defendant

[7] All defendants named in the First Amended Complaint are again named as defendants in the Second Amended Complaint.

Grain Elevators; Count XV alleges a state-law claim for negligence against the defendant Grain Elevators.

ADM filed a motion to dismiss the Second Amended Complaint. On March 22, 1999, the court granted ADM's motion. In granting ADM's motion to dismiss, the court concluded that the Producers failed to allege that ADM had granted any other defendant actual or implied authority to make representations about HTA agreements. The court ruled that under Federal Rule of Civil Procedure 9(b)'s heightened pleading standard for fraud, the Producers' allegations that other defendants promoted HTA agreements as agents of ADM were insufficient. On August 16, 2000, the Eighth Circuit Court of Appeals reversed and remanded finding that the Producers had made sufficient allegations that ADM was responsible as a principal for the fraudulent promotion of HTA agreements. *Gunderson v. ADM Investor Services, Inc.*, 230 F.3d 1363, 2000 WL 1154423, at *2 (8th Cir. 2000) (table decision).

Defendant ADM has again moved to dismiss all claims asserted against it in the Second Amended Complaint. Defendant ADM reasserts as grounds all issues raised in its prior motion to dismiss that were not ruled on by the court. First, ADM asserts that the Producers' fraud claims fail to meet the requirements of Federal Rule of Civil Procedure 9(b) because the Producers have failed to allege any fraudulent acts or misrepresentations by ADM itself, have failed to plead scienter, and have failed to allege causation with respect to their fraud claims. Second, ADM contends that the Producers' RICO claims fail to meet the requirements of Federal Rules of Civil Procedure 9(b) and 12(b)(6) because the Producers have failed to plead any RICO predicate acts, failed to properly allege an enterprise and the conduct or participation in the conduct of the enterprise's affairs, failed to allege a "pattern" of racketeering activity, and failed to connect ADM to the alleged predicate acts. Third, ADM contends that the Producers' CEA claim, related to their own HTA contracts, fails to meet the requirements of Federal Rules of Civil Procedure 9(b) and

12(b)(6) because the Producers have failed to plead their CEA claims with particularity, that the Producers lack standing to bring any private cause of action under the CEA against ADM arising out of their HTA transactions with defendants; that some of the Producers' CEA claims are barred by the CEA's two-year statute of limitations; that the Producers have failed to adequately allege any violation of 7 U.S.C. § 6a, 6(a), 6b, 6c(b) or 6o; and that the Producers may not bring a private cause of action to enforce CFTC rules and regulations. Fourth, ADM asserts that the Producers' claims related to commodity trading accounts fail because the Producers have neglected to allege any basis for their claims and the Producers lack standing to bring a private cause of action under the CEA. Fifth, ADM argues that the Producers have failed to allege any facts which would entitle them to punitive damages in their CEA claims. Sixth, ADM contends that the Producers' breach of fiduciary duty claim fails because the Producers have failed to assert a duty owed to them by ADM. Seventh, ADM asserts that the Producers' fraudulent inducement claim fails because the Producers have not alleged any of the requisite elements of that claim. Eighth, ADM charges that the Producers negligence claim fails because the Producers cannot bring a negligence claim for purely economic losses. ADM also charges that the Producers negligence claim also fails because the Producers have not alleged the elements of negligence. Finally, ADM contends that the Producers have failed to allege injury of damages resulting from any of their claims.

II. FACTUAL BACKGROUND

The factual background for disposition of the pending motion to dismiss is based entirely on the factual allegations contained in the Second Amended Complaint. The Producers allege that they are grain producers. Defendant ADM is alleged to be registered with the Commodity Futures Traders Commission ("CFTC") as a Futures Commissions Merchant ("FCM"). Defendant FAC-MARC is registered with the CFTC as a Commodity Trading Advisor ("CTA"). Defendants Agri-Plan and CSA are registered with the CFTC

as Introducing Brokers ("IB"). Defendants Farmers Co-op, Titonka, Buffalo Center, FCS, West Bend, FCE, Bode Co-op, and Cylinder Co-op are all alleged to be grain elevators.

The Producers aver that at some time prior to February 1993, the following entities and individuals entered into a conspiracy: ADM; FAC-MARC; Agri-Plan; FAC-MARC and Agri-Plan officers including Dennis Hofmeister, Perry Aalgaard, and Steve Logemann; CSA and its officers including Lee Amundson; A/C Trading 2000 and its general partners, James Gerlach, Alvin Fischbach and Chalmer Miller; A/C Trading Co. and its general partners, James Gerlach, and Chalmer Miller; Agro Systems Corporation; Brighton Commodities, Inc.; and, Titonka and its manager, Duane Toenges. The conspirators allegedly intended to evade the rules and regulations of the CFTC and the Chicago Board of Trade ("CBOT") through the marketing of the HTAs, and in doing so, achieve the objective of the conspiracy: control of grain merchandising in north central Iowa. The Producers allege that the conspirators intended to use the elevators to disseminate misrepresentations to farmers to entice them to enter into HTA contracts.

The Producers allege that FAC-MARC, Agri-Plan, CSA, and Titonka were acting as the actual and apparent agents of ADM. The Producers further aver that the actions and omissions of these entities and their respective employees were made within the scope of that agency relationship and with the intent of furthering ADM's interests.

Toenges and Hofmeister touted and solicited HTA contracts to Titonka's members on the condition that they hire Hofmeister as a consultant. At some point prior to 1994, Hofmeister, on behalf of the alleged conspirators, distributed a form HTA contract to elevators and farmers located in north central Iowa. At approximately the same time, FAC-MARC, Agri-Plan and CSA began conducting HTA seminars in north central Iowa with the purpose of promoting grain elevators to commence writing HTA contracts. As a result of these promotions, defendant Grain Elevators each engaged a member of the alleged conspiracy who, in turn, then enticed that defendant Grain Elevator's members to use HTA

contracts.

In addition to grain merchandising, Buffalo Center held itself out as a CTA and held itself out as an expert in grain marketing and the use of HTA contracts. In January 1993, Buffalo Center held a marketing meeting at the country club in Garner, Iowa. At the meeting, Dennis Alkire, on behalf of Buffalo Center, stated that: (a) the HTA contracts presented no risks; (b) roll fees were not paid until the crop was delivered; and (c) the HTA contracts could be rolled indefinitely. In referencing prior years' prices as examples, Aikens never used any year where the HTA contracts would have lost money. Henry Mayland stated that the farmers could sell amounts in excess of their anticipated annual crop and then "sell" their excess contracts to their neighbors. Ron Berschman attended a similar meeting held by Buffalo Center in March 1993, at which Alkire repeated the representations made at the January meeting.

On February 6, 1993, Daryl Cushman, Marvin and Ernest Heidecker all attended a seminar given by Perry Aalgaard, an Agri-Plan officer. At this seminar, Aalgaard represented that: (a) the HTA contracts offered a no risk method for hedging the price of grain; (b) the HTA contracts did not have a delivery date so there was no obligation to deliver upon them and the farmer could, instead, deliver on the cash market if the price on that market was better; (c) if the crop was smaller than projected, the shortage could be rolled forward; (d) without a delivery commitment, the farmer was free to hedge amounts of grain equivalent to one-hundred percent of the farmer's anticipated crop using HTA contracts; (e) all margin calls would be met by the elevator; and (f) the farmer could buy out the HTA contract at any time.

On July 8, 1993, plaintiffs Philip Asa, Keith Brandt and Dan Mueller all attended a seminar given by Hofmeister. At this seminar, Hofmeister represented that: (a) with the HTA contracts the farmers could lock in "5 years' worth of prices;" (b) they would face a minimal risk of two to three cents per bushel and never more than ten cents per bushel;

(c) that they could sell on the cash market if the cash price was higher than the HTA price; (d) the elevator would meet all margin calls; and (e) the farmer could buy out the HTA contract at any time. Hofmeister made similar representations in a seminar attended by plaintiff David Gerber. In February 1994, plaintiffs Gary and Janice Hoover attended a seminar at the Barn, a facility located outside of Titonka, Iowa, during which Hofmeister and Toenges made consistent representations regarding the benefits of HTA contracts.

In February 1994, Toenges met with plaintiffs Dan DeWaard, Rande Giesking, Bruce Kitzinger, Gary Hoover, and Jerry Dreesman at the Titonka elevator office. At this meeting, Toenges represented that: (a) the HTA contracts would take the risk out of farming; (b) the participants would be able to give their bankers "hard numbers" for the value of future crops; (c) as a result of the rolling feature of HTA contracts, participants could hedge their entire crop rather than only a percentage; and, (d) the farmer could buy out of the HTA contract at any time.

In May 1994, Mayland asked Shawn Thomsen to write HTA contracts. Mayland represented that the HTA contracts were risk-free, could be rolled indefinitely and that a farmer could sell amounts equivalent to one hundred percent of his anticipated production.

On June 29, 1994, Aalgaard and Logemann held a meeting at the Farmers Trust and Savings Bank in Buffalo Center. Aalgaard and Logemann made representations at this meeting regarding the benefits of HTA contracts consistent with those detailed above. Plaintiff Loucks attended this meeting. Following this meeting, plaintiff Johnson agreed to write HTA contracts. Logemann wrote HTA contracts between Johnson and Farmers Co-op with the assistance of Farmers Co-op's manager, Donald Goetz. Allegedly, Logemann falsely represented to Goetz that Johnson and other farmers doing business with Farmers Co-op would cease doing business there unless Goetz agreed to begin writing HTA contracts. As a result of Logemann's admonition, Goetz agreed to write HTA contracts.

On July 4, 1994, Lee Amundson, the President of CSA, held a meeting at the Clear

Lake Best Western on behalf of ADM and Buffalo Center. Amundson represented that HTA contracts were safe and that HTA contracts: (a) enable the farmer to lock in a price for his or her contract; (b) provide unlimited rolling so that farmers could take advantage of higher cash prices for their crops; (c) were virtually risk free; and (d) could be bought out at any time. Plaintiffs Clarence and Christian Miller were in attendance at this meeting.

In August 1994, Hofmeister met with Jay Gunderson and repeated the representations regarding HTA contracts detailed above. In September 1994, Hofmeister met with the Harringtons and repeated the representations regarding HTA contracts. In September 1994, Hofmeister and Toenges met with Dan DeWaard, Duane DeWaard, his banker Dennis Ruecker, and Steve Heyer. At this meeting, Hofmeister and Toenges again repeated their representations regarding HTA contracts.

In December 1994, plaintiff Ron Broderson met with Ray Beenken, West Bend's controller, at Beenken's office. Beenken stated that "the beauty" of the HTA program was that the farmer could deliver under the HTA contract or roll the HTA contract and deliver on the cash market if the cash price was higher, and the farmer could buy out the HTA contract at any time. Beenken represented that the HTA price was the "floor" price and that the price could only be improved by "capturing the carry" as the underlying futures hedge was rolled forward. He told Broderson that the "only risk" to the farmer was if a farmer set his price objective too high so that it did not get filled. Beenken repeated these representations to plaintiff Ed Noonan in December 1995.

On January 17, 1995, Buffalo Center sponsored a meeting at a church in Swea City, at which Mayland and Earl Cornelius made representations regarding HTA contracts. Buffalo Center sent invitations for this meeting to over 700 patrons. Plaintiff William Walstead was present at this meeting. Mayland repeated the representations he had previously made regarding HTA contracts at the meeting. In February 1995, Mayland held

a meeting at Buffalo Center and again repeated the representations he had previously made regarding HTA contracts. Dale Meinders, John Oftedahl and Duane Davids were at this meeting.

On February 15, 1995, Hofmeister met with Ed and Jim Otis at the Days Inn in Clear lake, Iowa. Hofmeister repeated the representations regarding HTA contracts that he had made at other, earlier meetings. Similarly, in March 1995, Hofmeister met with Ron and Debbie Schmidt, on April 3, 1995, he met with Bob Becker and Bob Grim, on May 9, 1995, he met with Beverly Everett, and on June 28, 1995, he met with Denny and Mike Cink. On each of these occasions Hofmeister repeated, to the aforementioned plaintiffs, the representations regarding HTA contracts that he had previously made.

On February 24, 1995, Hofmeister, Aalgard and Toenges held a second meeting at the Barn and repeated the representations regarding HTA contracts that had been made the preceding year. Dennis and Reginald Schutjer, Rich Gardner, and Steve Berschman attended the meeting at the Barn. In December 1993, Berschman had been told by Tom Myer that: (a) the elevator would pay all margins on the HTA contracts; (b) the HTA contracts could be rolled by the farmer at the farmer's discretion; and, (c) the HTA contracts could be rolled forward indefinitely. Hofmeister did not disclose that: (a) the HTA contract "entailed an old crop/new crop spread" that held unlimited risk of loss; (b) a farmer who "set the basis" could not be guaranteed the price selected and was facing the risk of unlimited loss from the time he set the basis until the offsetting futures position was actually liquidated; (c) the farmer was running a credit risk; (d) an inverse market could be so severe that the farmer might never roll the position to a positive; and (e) he lacked any actual experience in writing multi-year HTA programs and had never "rolled" through an inverse market.

In February or March of 1995, Hofmeister, Aalgard and Toenges held a meeting in the basement of the Titonka elevator, and repeated the representations regarding HTA

contracts that had been made in prior meetings. Jerry Giesking and Tom Lichter were present at this meeting. Following this meeting, Aalgaard met with Ray and Tom Lichter and Robert Arendt at Tom Litchter's place of business. Aalgaard again repeated the representations regarding HTA contracts that had been made in prior meetings.

In March 1995, Myer told Steve Shortenhaus that Buffalo Center would now permit farmers to roll contracts indefinitely and that Shortenhaus could write multiple year HTA contracts with no risks. Myer had previously, at different times, told Dale Kramersmeier, James Hofbauer, James Junkmeier, Harold and Karen Davids, Dale Koppen, Mark Hamilton, and Ron Ennen that HTA contracts were risk free, that the elevator would pay all margins, that the farmer could roll contracts indefinitely and that the farmer could deliver on the cash market or roll the HTA contract. Mayland made near identical representations to Bruce Meinders, Les Beekman, and Rick Hofbauer.

In December 1995, plaintiff Jon Olson had a conversation with Mike Bierle at FCE regarding HTA contracts. Bierle told Olson that Olson Farms could hedge amounts equivalent to five years of crop through HTA contracts which had unlimited rolling and which enabled the farmer to deliver on the cash market if the price was better or if production was below projections. Bierle stated that risk of HTA contracts was negligible. Laurence Doden also spoke to Bierle about entering into HTA contracts with FCE. Bierle told Doden that HTA contracts could be rolled indefinitely, that HTA contracts could be bought out, that the elevator would meet margin calls, and that Doden could deliver on the cash market if he desired.

Based on the representations detailed above regarding HTA contracts, the Producers began writing HTA contracts with the Grain Elevators. During each of the meetings identified above, the defendants allegedly failed to disclose that: (a) the Producers were undertaking a naked short position in the futures market for the commodity futures and/or commodity options contracts that the Grain Elevators would undertake in connection with

the HTA contracts; (b) the Producers faced unlimited risk of loss; (c) the possibility of realizing losses increased directly with the amount of time the farmer would be required to roll the underlying futures positions; (d) the defendants intended to misrepresent to the CBOT the nature of the underlying contracts; (e) the Grain Elevators secretly reserved certain rights; and (f) the HTA would lose value if the new crop grain prices failed to maintain their strength versus the old crop futures prices.

In the fall of 1995, Hofmeister and Toenges advised all Producers with HTA contracts with Titonka and FAC-MARC to "take advantage of the higher cash prices and roll the HTA contracts forward." In November 1995, Toenges told Bruce and David Kitzinger that once farmers had committed to multi-year HTA contracts, "we will control the basis" and that he would raise the basis ten cents on any farmer who decided to deliver grain against the HTA contract rather than rolling the HTA contract forward. Toenges declared to the Kitzingers that "there's not a damn thing the farmers can do about it."

III. LEGAL ANALYSIS

A. Standards For Motions To Dismiss

This court has considered in some detail the standards applicable to motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) in a number of published decisions. *See, e.g., Adler v. I & M Rail Link, L.L.C.*, 13 F. Supp. 2d 912, 917 (N.D. Iowa 1998); *Terra Indus., Inc. v. Commonwealth Ins. Co. of Am.*, 990 F. Supp. 679, 682 (N.D. Iowa 1997); *Leiberkneckt v. Bridgestone/Firestone, Inc.*, 980 F. Supp. 300, 302 (N.D. Iowa 1997); *North Cent. F.S., Inc. v. Brown*, 951 F. Supp. 1383, 1404 (N.D. Iowa 1996); *Powell v. Tordoff*, 911 F. Supp. 1184, 1188 (N.D. Iowa 1995); *Quality Refrigerated Servs., Inc. v. City of Spencer*, 908 F. Supp. 1471, 1489 (N.D. Iowa 1995); *Reynolds v. Condon*, 908 F. Supp. 1494, 1502 (N.D. Iowa 1995); *Dahl v. Kanawha Inv. Holding Co.*, 161 F.R.D. 673, 681 (N.D. Iowa 1995). Indeed, in this case, the court reviewed this set

of standards in some detail in each of its prior three orders regarding defendant ADM's previous motions to dismiss. Because the court does not find that intervening decisions have altered these standards in any way, it will not repeat the discussions of those standards here.

B. Fraud And CEA Claims

1. Fraudulent Actions By ADM

Initially, ADM asserts that the Producers have failed to meet the requirements of Federal Rule of Civil Procedure 9(b) because the Producers have failed to allege any fraudulent acts or misrepresentations by ADM itself.[8] The court concludes that this issue is controlled by the Eighth Circuit Court of Appeals' August 16, 2000, decision in this case. In that decision, the Eighth Circuit Court of Appeals found that "[e]ven if the HTA agreements here were unregulated cash forward contracts, *see Haren v. Conrad Coop.*, 198 F.3d 683, 684 (8th Cir. 1999), plaintiffs have sufficiently alleged that ADMIS was responsible as a principal for the fraudulent promotion of HTA agreements." *Gunderson v. ADM Investor Services, Inc.*, 230 F.3d 1363, 2000 WL 1154423, at *2 (8th Cir. 2000) (table decision). Therefore, this portion of defendant ADM's motion to dismiss is denied.

2. Pleading Scienter

ADM contends that conclusory allegations of scienter are insufficient. In response, the Producers cite to sections from their complaint that they assert establish the requisite specificity of the fraud pleadings, and cite other sources, such as the dates the HTA

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[8] Rule 9(b) of the Federal Rules of Civil Procedure provides as follows:

> **(b) Fraud, Mistake, Condition of the Mind.** In all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

FED. R. CIV. P. 9(b).

contracts were executed, as identifying adequately by inference the time and place misrepresentations were made.

Rule 9(b) of the Federal Rules of Civil Procedure "requires a plaintiff to allege with particularity the facts constituting the fraud." *See Independent Business Forms v. A-M Graphics*, 127 F.3d 698, 703 n.2 (8th Cir. 1997); *see also Roberts v. Francis*, 128 F.3d 647, 651 (8th Cir. 1997) ("Under Rule 9(b), '[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity.' "). "When pleading fraud, a plaintiff cannot simply make conclusory allegations." *Roberts*, 128 F.3d at 651 (citing *Commercial Property Inv., Inc. v. Quality Inns Int'l*, 61 F.3d 639, 644 (8th Cir.1995)). In this legal analysis, the court will focus on the adequacy of the pleadings of fraud with respect to the pleading of scienter.

In light of the requirements imposed by Rule 9(b), this court has held that

> "general averments of the defendants' knowledge of material falsity will not suffice. Consistent with Fed.R.Civ.P. 9(b), the complaint must set forth specific facts that make it reasonable to believe that defendant[s] knew that a statement was materially false or misleading."

Brown v. North Cent. F.S., Inc., 173 F.R.D. 658, 669 (N.D. Iowa 1997) (quoting *Lucia v. Prospect Street High Income Portfolio, Inc.*, 36 F.3d 170, 174 (1st Cir. 1994), in turn quoting *Serabian v. Amoskeag Bank Shares, Inc.*, 24 F.3d 357, 361 (1st Cir. 1994)); *Brown v. North Cent. F.S., Inc.*, 951 F. Supp. at 1408 (quoting *DeWit v. Firstar Corp.*, 879 F. Supp. 947, 989-90 (N.D. Iowa 1995)).

Here, the court concludes that the Producers have set forth in their Secpond Amended Complaint specific facts that make it reasonable to believe that ADM's agents knew that their statements were materially false or misleading. *See Lucia*, 36 F.3d at 174 (quoting *Serabian*, 24 F.3d at 361); *see also North Central F.S., Inc.*, 951 F. Supp. at 1408 (quoting *DeWit*, 879 F. Supp. at 989-90, in turn quoting *Lucia*, 36 F.3d at 174). The Producers assert

that there were facts known to ADM's agents at the time the alleged misrepresentations were made from which ADM's agents would or should have known that the representations in question were false or misleading. *See* Second Amended Compl. at ¶¶ 23-24, 55-118. Therefore, the court concludes that the amended complaint does allege with particularity either the falsity of the alleged misrepresentations or ADM's knowledge or notice of such falsity. Thus, this portion of ADM's motion to dismiss is denied.

3. Causation

ADM also asserts that the Producers have failed to adequately plead fraud because they have not made adequate allegations with respect to causation. It must be remembered that the rules of pleading under the Federal Rules of Civil Procedure are liberal. *See Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862, 865 (8th Cir. 1999); *In re NationsMart Corp. Sec. Litig.*, 130 F.3d 309, 316 (8th Cir. 1997), *cert. denied sub nom. NationsMart v. Carlon*, 524 U.S. 927 (1998); *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 658 (8th Cir. 1995). Federal Rule 8(a)(2) requires a plaintiff to plead only "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." *See Conley v. Gibson*, 355 U.S. 41, 47 (1957) ("[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts on which he bases his claim."). As the Eighth Circuit Court of Appeals has instructed: "The essential function of a complaint under the Federal Rules of Civil Procedure is to give the opposing party 'fair notice of the nature and basis or grounds for a claim, and a general indication of the type of litigation involved.'" *Hopkins v. Saunders*, 199 F.3d 968, 973 (8th Cir. 1999) (quoting *Redland Ins. Co. v. Shelter Gen. Ins. Cos.*, 121 F.3d 443, 446 (8th Cir. 1997)).

Here, the court notes that the Producers aver that ADM's agents misrepresented the risky nature of HTA contracts to the Producers and failed to inform the Producers of the risks posed by HTA contracts. Second Amended Compl. at ¶¶ 24, 55-100, 119. If these risks had been disclosed, the Producers allege that they would not have written HTA

contracts. Second Amended Compl. at ¶ 127. These factual allegations are sufficient, albeit perhaps marginally so, to satisfy the liberal pleading requirements of the federal rules with regard to causation. Therefore, this portion of ADM's motion to dismiss is denied.

4. CEA statute of limitations

ADM argues that the CEA claims of twenty-nine of the plaintiffs are barred by the the CEA's statute of limitations. Section 25(c) of Title 7 dictates that any private action for CEA violations "shall be brought not later than two years after the date the cause of action arises." 7 U.S.C. § 25(c). A claim under the CEA arises when plaintiffs are put on inquiry notice of a potential claim. That is, the claim accrues and the limitations period commences to run when circumstances would suggest to a person of ordinary intelligence the probability that he has a potential claim. *See Benfield v. Mocatta Metals Corp.*, 26 F.3d 19, 22 (2d Cir. 1994); *Dodds v. Cigna Secs.*, Inc., 12 F.3d 346, 350 (2d Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994). At that juncture, the CEA plaintiff assumes a duty of inquiry, and knowledge will be imputed to the plaintiff even if that plaintiff does not make that inquiry. *Dodds*, 12 F.3d at 350. The Producers filed the complaints in this action on June 5, 1996, and June 14, 1996. For their claims to be timely, each of the Producers must not have been put on inquiry notice before June 5, 1994, or June 14, 1994, absent application of a tolling doctrine. The allegations contained in the Second Amended Complaint do not permit the court to conclude that the Producers knew or should have known of the alleged fraud before June 5, 1994, or June 14, 1994. Rather, resolution of whether the circumstances presented in this case triggered the running of the statute of limitations is a factually sensitive issue which cannot properly be resolved here. Therefore, this portion of ADM's motion is denied.

5. Allegations of futures contracts

The Producers' claims in Count VI are premised on the assertion that the HTAs are "off-exchange futures contracts or trade options in violation of 7 U.S.C. § 6(a) and/or

6c(b)." Second Amended Compl. at ¶ 195. ADM contends in its motion that the Producers cannot state a cause of action under the CEA because the HTAs at issue in this litigation are not "off-exchange futures contracts." ADM argues instead that the HTAs are contracts for deferred delivery and therefore not governed by the CEA. *See Grain Land Coop. v. Kar Kim Farms, Inc.*, 199 F.3d 983, 992 (8th Cir. 1999) ("the CEA excludes from its reach 'any sale of any cash commodity for deferred shipment or delivery.'") (quoting 7 U.S.C. § 1a(11)). In response, the Producers assert that the deferred delivery contract defense raised by ADM constitutes an affirmative defense under the CEA and, as a result, is not a proper subject for a motion to dismiss. The Producers alternatively contend that the question of whether the HTAs at issue in this litigation are illegal, off-exchange futures contracts or legal, deferred delivery contracts is a fact question that is also inappropriate for resolution on a motion to dismiss.[9] The court will address the Producers' later argument

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[9]The Eighth Circuit Court of Appeals has noted the Fourth Circuit Court of Appeals's explanation for the distinction:

> "Because the [CEA] was aimed at manipulation, speculation, and other abuses that could arise from the trading in futures contracts and options, as distinguished from the commodity itself, Congress never purported to regulate 'spot' transactions (transactions for the immediate sale and delivery of a commodity) or 'cash forward' transactions (in which the commodity is presently sold but its delivery is, by agreement, delayed or deferred) . . . . Transactions in the commodity itself which anticipate actual delivery did not present the same opportunities for speculation, manipulation, and outright wagering that trading in futures and options presented. From the beginning, the CEA thus regulated transactions involving the purchase or sale of a commodity 'for future delivery' but excluded transactions involving 'any sale of any cash commodity for deferred shipment or delivery.'"

(continued…)

first.

The Eighth Circuit Court of Appeals recently provided the following guidance on determining whether a transaction constitutes an unregulated cash-forward contract:

> [I]t is the contemplation of physical delivery of the subject commodity that is the hallmark of an unregulated cash-forward contract. In order to determine whether a transaction is an unregulated cash-forward contract, we must decide "whether there is a legitimate expectation that physical delivery of the actual commodity by the seller to the original contracting buyer will occur in the future." *Andersons*, 166 F.3d at 318; *see also Lachmund*, 191 F.3d at 787-88; *CFTC v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 772-73 (9th Cir. 1995); *Oeltjenbrun v. CSA Investors, Inc.*, 3 F. Supp.2d 1024, 1039- 40 (N.D. Iowa 1998).
>
> Courts engaged in this inquiry have shunned self-serving labels attached to the contracts in question, and instead examined the intentions of the parties, the terms of the contract, the course of dealing between the parties, and any other relevant factors to determine whether the parties contemplated physical delivery. This individualized, multi-factor approach scrutinizes each transaction for such characteristics as whether the parties are in the business of obtaining or producing the subject commodity; whether they are capable of delivering or receiving the commodity in the quantities provided for in the contract; whether there is a definite date of delivery; whether the agreement explicitly requires actual delivery, as opposed to allowing the delivery obligation to be rolled indefinitely; whether payment takes place only upon delivery; and whether the contract's terms are individualized, rather than standardized. *See Lachmund*, 191 F.3d at 787; *Andersons*, 166 F.3d at 320; *Co Petro*, 680 F.2d at 578-79. We believe that this approach, which the district court

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[9](…continued)
Grain Land Coop., 199 F.3d at 991 n.5 (*Salomon Forex, Inc. v. Tauber*, 8 F.3d 966, 970-71 (4th Cir. 1993) (citations and footnote omitted)).

> applied to Obermeyer's contracts, *see In re Grain Land Coop Cases*, 978 F. Supp. at 1273-74, is the appropriate method to determine whether a contract contemplates actual delivery, and thus the best means of identifying those transactions which Congress sought to regulate through the CEA.

Grain Land Coop., 199 F.3d at 990-91.

The court recognizes that the Producers have attached a number of the HTAs to their Second Amended Complaint and therefore the text of most of the HTAs involved in this litigation is currently before the court. Nonetheless, because this inquiry requires the court to examine, *inter alia*, "the intentions of the parties" and determine "whether the parties contemplated physical delivery," *Grain Land Coop.*, 199 F.3d at 991, the court concludes that the question of whether the HTAs are futures contracts or cash forward contracts is a fact intensive issue that precludes determination on a motion to dismiss.[10] Rather, the court concludes that such an assessment here may only be made, if at all, on a motion for summary judgment. Therefore, this segment of ADM's motion is also denied.[11]

6. Standing

ADM also seeks dismissal of Count VI on the ground that the Producers lack standing to bring this claim. The CEA specifically authorizes private causes of action:

> (1) Any person (other than a contract market, clearing organization of a contract market, licensed board of trade, or

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[10]The court notes that the Second Amended Complaint contains allegations that delivery was not required under the HTAs. Second Amended Compl. at ¶¶ 58, 60, 64, 68, 73, 73, 76, 77, 80, 84, 87, 88, 89, 91, 92.

[11]Although the court has denied this portion of ADM's motion to dismiss, in light of the Eighth Circuit Court of Appeals's recent decision in *Grain Land Coop.*, the court has grave doubts regarding the viability of the Producers' CEA claims. Nevertheless, as the parties pursue discovery in this matter, the court urges the Producers' to reevaluate the viability of their CEA claims in light of the *Grain Land Coop.* decision.

> registered futures association) who violates this chapter or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter shall be liable for actual damages resulting from one or more of the transactions referred to in subparagraphs (A) through (D) of this paragraph and caused by such violation to any other person--
> (A) who received trading advice from such person for a fee;
> (B) who made through such person any contract of sale of any commodity for future delivery (or option on such contract or any commodity); or who deposited with or paid to such person money, securities, or property (or incurred debt in lieu thereof) in connection with any order to make such contract;
> (C) who purchased from or sold to such person or placed through such person an order for the purchase or sale of--(i) an option subject to section 6c of this title (other than an option purchased or sold on a contract market or other board of trade); (ii) a contract subject to section 23 of this title; or (iii) an interest or participation in a commodity pool; or
> (D) who purchased or sold a contract referred to in subparagraph (B) hereof if the violation constitutes a manipulation of the price of any such contract or the price of the commodity underlying such contract.

7 U.S.C. § 25(a)(1)(A)-(D).

The Producers contend that they have met one of the statutory prerequisites and have standing to sue ADM for violations of the CEA because they entered into HTA contracts based on representations made by ADM's agents. *See* 7 U.S.C. § 25(a)(1). Although the court has serious doubts regarding the viability of the Producers' CEA claims, because the court has determined that the question of whether the HTAs are futures contracts or cash forward contracts is a factual issue, the connected question of standing cannot be determined on a motion to dismiss. Therefore, this portion of ADM's motion is denied.

7. Excessive speculation

Regarding Count VI, the Producers contend that ADM violated Section 4a of the CEA, 7 U.S.C. § 6a, which prohibits a party from trading in excess of the speculative

limits fixed by the CFTC.[12] ADM asserts that the Producers lack standing to bring such

[12]Section 6a provides that:

> a) Burden on interstate commerce; trading or position limits
>
> Excessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the Commission shall, from time to time, after due notice and opportunity for hearing, by rule, regulation, or order, proclaim and fix such limits on the amounts of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market as the Commission finds are necessary to diminish, eliminate, or prevent such burden. In determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person; and further, such limits upon positions and trading shall apply to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single person. Nothing in this section shall be construed to prohibit the Commission from fixing different trading or position limits for different commodities, markets, futures, or delivery months, or for different number of days remaining until the last day of trading in a contract, or different trading limits for buying and selling operations, or different limits for the purposes of paragraphs (1) and (2) of subsection (b) of this section, or from exempting transactions normally known to the trade as "spreads" or "straddles" or

(continued…)

a claim under Section 22. Therefore, the issue before the court is whether there is a private right of action under the excessive speculation provisions found in 7 U.S.C. § 6a. Clearly, no private right of action is expressed in the statute. The Producers have not cited and the court has not found any case holding that a private right of action exists under the excessive speculation provision. At least two cases have held that a private right of action does not exist under that provision. *In re Soybean Futures Litigation*, 892 F. Supp. 1025, 1042 (N.D. Ill. 1995); *Liang v. Hunt*, 477 F. Supp. 891, 891 (N.D. Ill. 1979).

In the *In re Soybean Futures Litigation* case, the court made the following observations regarding this issue:

> Section [6a] itself does not define excessive speculation or set forth any speculative limits; rather, Congress directed the CFTC to set and enforce limits on the positions a party may hold and the amount of trading it may conduct, with exemptions available for bona fide hedging. 7 U.S.C. § 6a(a)-(c). Neither Section [6a] nor Section 22 authorize private enforcement of CFTC regulations, nor have the courts been willing to recognize such a claim. *See Davis v. Coopers & Lybrand*, 787 F. Supp. 787, 799 (N.D. Ill. 1992) (dismissing claim because "the exclusive private remedy under CEA § 22 does not include a cause of action for violations of CFTC Regulations"); *Khalid Bin Alwaleed Found. v. E.F. Hutton & Co.*, 709 F. Supp. 815, 820 (N.D. Ill. 1989) (finding that "Congress did not intend that the rules promulgated by the CFTC should give rise to a private

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[12](…continued)

> "arbitrage" or from fixing limits applying to such transactions or positions different from limits fixed for other transactions or positions. The word "arbitrage" in domestic markets shall be defined to mean the same as a "spread" or "straddle". The Commission is authorized to define the term "international arbitrage".

7 U.S.C. § 6a.

> cause of action"). Moreover, Defendants assert that under this set of facts, Plaintiffs' claim of excessive speculation satisfies none of the four "transaction conditions" required to bring a claim under Section 22(a), 7 U.S.C. § 25(a)(1). The only possible condition of relevance is manipulation, *id.* § 25(a)(1)(D), yet if Plaintiffs are arguing that Defendants' alleged violation of the speculative limits caused prices to be manipulated or was part of a manipulative scheme, Plaintiffs are describing two components of the same claim, not bringing two separate claims under the CEA.

In re Soybean Futures Litigation, 892 F. Supp. at 1042. The court concurs and concludes that no private cause of action exists under the excessive speculation provisions found in 7 U.S.C. § 6a. Therefore, this portion of ADM's motion is granted.

8. Commodity trading advisor

In Count VI, the Producers assert, *inter alia,* that ADM and FAC-MARC violated the CEA prohibition on fraud and misrepresentation.[13] 7 U.S.C. § 6o. ADM seeks

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[13]Section 6o provides that:

> (1) It shall be unlawful for a commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly--
>
> (A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or
>
> (B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant.
>
> (2) It shall be unlawful for any commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator registered under this chapter to represent or imply in any manner whatsoever that such person has been sponsored,

(continued…)

dismissal of that portion of Count VI which is based on a violation of § 6o on the ground that the Producers have failed to adequately plead facts establishing that it is a "commodity trading advisor" under the CEA. The CEA defines "commodity trading advisor" as any person who:

> (i) for compensation or profit, engages in the business of advising others, either directly or through publications, writing, or electronic media, as to the value of or the advisability of trading in--
> (I) any contract of sale of a commodity for future delivery made or to be made on or subject to the rules of a contract market;
> (II) any commodity option authorized under section 6c of this title; or
> (III) any leverage transaction authorized under section 23 of this title; or
> (ii) for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the activities referred to in clause (i).

7 U.S.C. § 1a(5)(A).[14]

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[13](…continued)

> recommended, or approved, or that such person's abilities or qualifications have in any respect been passed upon, by the United States or any agency or officer thereof. This section shall not be construed to prohibit a statement that a person is registered under this chapter as a commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator, if such statement is true in fact and if the effect of such registration is not misrepresented.

7 U.S.C. § 6o.

[14]Exceptions to this definition are found in 7 U.S.C. § 1a(5)(B), which provides that:

> Subject to subparagraph (C), the term "commodity

(continued…)

As the court pointed out above, all well-pleaded factual allegations are assumed true and are viewed in the light most favorable to the Producers, *Papasan v. Allain*, 478 U.S. 265, 283 (1986), and a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *Conley*, 355 U.S. at 45-46. Here, although ADM is alleged to be a FCM, defendant FAC-MARC is alleged to be a CTA and an agent of ADM. Second Amended Complaint at ¶ 2(B). Thus, under the doctrine of respondeat superior, ADM may be held liable for the violations of CEA committed by its agent, FAC-MARC. Accordingly, the court concludes that the allegations contained in the Second Amended Complaint are sufficient to state a claim under vicarious liability against ADM. Therefore, this portion of ADM's motion is denied.

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[14](…continued)

> trading advisor" does not include--
> (i) any bank or trust company or any person acting as an employee thereof;
> (ii) any news reporter, news columnist, or news editor of the print or electronic media, or any lawyer, accountant, or teacher;
> (iii) any floor broker or futures commission merchant;
> (iv) the publisher or producer of any print or electronic data of general and regular dissemination, including its employees;
> (v) the fiduciary of any defined benefit plan that is subject to the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001 *et seq.*);
> (vi) any contract market; and
> (vii) such other persons not within the intent of this paragraph as the Commission may specify by rule, regulation, or order.

7 U.S.C. § 1a(5)(B). Section 1a(5)(C) provides that: "Subparagraph (B) shall apply only if the furnishing of such services by persons referred to in subparagraph (B) is solely incidental to the conduct of their business or profession." 7 U.S.C. § 1a(5)(C).

9. Punitive damages

ADM also seeks dismissal of the Producers' claims for punitive damages under the CEA pursuant to 7 U.S.C. § 25(a)(3) on the ground that the Producers have not alleged CEA violations on the part of ADM which arose "in the execution of an order on the floor" of a contract market.[15] Section 25(a)(3)(B) states in pertinent part:

> In any action arising from a violation in the execution of an order on the floor of a contract market, the person referred to in paragraph (1) shall be liable for . . . where the violation is willful and intentional, punitive or exemplary damages equal to no more than two times the amount of such actual damages.

7 U.S.C. § 25(a)(3). Because the Producers have not asserted that ADM willfully and intentionally committed violations of the CEA arising from the execution of an order on the floor of a contract market, this portion of ADM's motion is granted and the Producers' claims for punitive damages under 7 U.S.C. § 25(a)(3) are dismissed.

C. RICO Claims

ADM also challenges the sufficiency of the pleadings with respect to the Producers' RICO claims. The court will take up each of ADM's arguments with respect to the Producers' RICO claims *seriatim.*

1. Pleading Elements Of RICO

This court has previously considered in some detail the purpose and scope of RICO. *See generally Reynolds v. Condon*, 908 F. Supp. 1494, 1506-07 (N.D. Iowa 1995); *De Wit v. Firstar Corp.*, 879 F. Supp. 947, 960-62 (N.D. Iowa 1995). Thus, the court will not repeat that discussion here. The Producers allege that ADM violated 18 U.S.C. § 1962(c),

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[15]The Second Amended Complaint incorrectly lists the CEA provision as being 7 U.S.C. § 25(3)(b). It is uncontested that the correct CEA provision is found in 7 U.S.C. § 25(a)(3).

which is the provision of RICO that makes it "unlawful for any person . . . associated with an enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." 18 U.S.C. § 1962(c); *see Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 384 n.1 (8th Cir.), *cert. denied*, 508 U.S. 957 (1993); *Diamonds Plus, Inc. v. Kolber*, 960 F.2d 765, 768 (8th Cir. 1992); *Atlas Pile Driving Co. v. DiCon Financial Co.*, 886 F.2d 986, 990 (8th Cir. 1989). This court previously made the following observations regarding what a plaintiff must demonstrate in order to establish a RICO violation under 18 U.S.C. § 1962(c):

> " '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity that must include at least two racketeering acts.'" *Sedima*, 473 U.S. at 496, 105 S. Ct. at 3285; *United States v. Nabors*, 45 F.3d 238, 239 (8th Cir.1995) (quoting *Sedima* for the elements of the violation in a criminal RICO prosecution); *Nolte v. Pearson*, 994 F.2d 1311, 1316-17 (8th Cir. 1993); *Bowman*, 985 F.2d at 385 (quoting *Sedima*); *Terry A. Lambert Plumbing, Inc. v. Western Sec. Bank*, 934 F.2d 976, 979 n.4 (8th Cir. 1991); *Granite Falls Bank*, 924 F.2d at 153; *Atlas Pile Driving Co.*, 886 F.2d at 990; and compare *United States v. Bennett*, 44 F.3d 1364, 1373 (8th Cir. 1995) (another criminal RICO prosecution in which the court stated that "[t]o prove a substantive RICO violation, the government must establish: 1) the existence of an enterprise affecting interstate or foreign commerce; 2) the defendant's association with the enterprise; 3) that the defendant participated in the conduct of the enterprise's affairs; and 4) that the defendant's participation was through a pattern of racketeering activity," citing *United States v. Sinito*, 723 F.2d 1250, 1260 (6th Cir. 1983), *cert. denied*, 469 U.S. 817, 105 S. Ct. 86, 83 L. Ed.2d 33 (1984), and *United States v. Phillips*, 664 F.2d 971, 1011 (5th Cir. 1981), *cert. denied sub nom. Meinster v. United States*, 457 U.S. 1136, 102 S. Ct. 2965, 73 L. Ed.2d 1354 (1982)). The court in *Sedima* concluded that
>
> > the statute requires no more than this. Where

> the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. . . . Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.
>
> *Sedima*, 473 U.S. at 496-97, 105 S. Ct. at 3285-86 (footnotes omitted); *Bowman*, 985 F.2d at 385 (quoting *Sedima*). The Eighth Circuit Court of Appeals describes this as a "proximate cause" requirement that the injury asserted be proximately caused by the predicate acts alleged. *Bowman*, 985 F.2d at 387 (citing *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268, 112 S. Ct. 1311, 1318, 117 L. Ed.2d 532 (1992), and *Schiffels v. Kemper Fin. Serv.*, 978 F.2d 344, 351 (7th Cir. 1992)).

Condon, 908 F. Supp. at 1507-08; *see Handeen v. Lemaire*, 112 F.3d 1339, 1347 (8th Cir.1997) ("A plaintiff who brings suit under 18 U.S.C. § 1962(c) must prove that the defendant engaged in (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."). The court therefore turns next to an examination of ADM's arguments regarding the Producers' RICO claims in this case.

2. Predicate Acts

ADM asserts that the Producers have failed to plead with particularity certain of the predicate acts underlying the alleged RICO violations.

a. RICO enterprise

ADM initially asserts that the Producers have failed to plead the "enterprise" element of a RICO violation with respect to Count IV. Clearly, the Producers have identified as an enterprise the association-in-fact formed by ADM, Agri-Plan, FAC-MARC, CSA, and Titonka to market HTA accounts and related consulting agreements and commodity accounts. Second Amended Compl. at ¶ 181. Therefore, the question is

whether this association-in-fact can constitute a proper RICO enterprise. In *Condon*, this court explained in detail this particular requirement of RICO:

> The decisions of the Eighth Circuit Court of Appeals consistently define a RICO enterprise as exhibiting three basic characteristics: (1) a common or shared purpose; (2) some continuity of structure and personnel; and (3) an ascertainable structure distinct from that inherent in a pattern of racketeering. *Nabors*, 45 F.3d at 240 (quoting *Atlas Pile Driving Co.*, 886 F.2d at 995); *Diamonds Plus, Inc.*, 960 F.2d at 770-71 (also quoting *Atlas Pile Driving Co.*, 886 F.2d at 995. The first characteristic, common or shared purpose, has apparently troubled the courts little, while the second, continuity of structure and personnel, has been of less certain meaning. *De Wit*, 879 F. Supp. at 966. The Eighth Circuit Court of Appeals has held that "continuity" does not require that members remain consistent. *Nabors*, 45 F.3d at 240. "Indeed, this circuit's definition of an enterprise specifically includes the phrase 'some continuity . . . of personnel' (emphasis supplied), *Atlas Pile Driving Co.*, 886 F.2d at 995, not 'complete continuity.'" *Id*. The third characteristic, distinct structure, has required the most clarification. *De Wit*, 879 F. Supp. at 967. The Eighth Circuit Court of Appeals has defined the meaning of this characteristic as follows:
>
> > Th[e] distinct structure might be demonstrated by proof that a group engaged in a diverse pattern of crimes or that it has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes. The command system of a Mafia family is an example of this type of structure as is the hierarchy, planning, and division of profits within a prostitution ring.
>
> *Diamonds Plus, Inc.*, 960 F.2d at 770 (quoting *United States v. Bledsoe*, 674 F.2d 647 (8th Cir.), *cert. denied sub nom. Phillips v. United States*, 459 U.S. 1040, 103 S. Ct. 456, 74 L. Ed. 2d 608 (1982)). Thus, the "focus of the inquiry" on this characteristic is "whether the enterprise encompasses more than what is necessary to commit the predicate RICO offense." *Id*.

Condon, 908 F. Supp. at 1509.

Here, ADM asserts that the Producers have failed to plead a common or shared purpose with respect to Count IV. The Eighth Circuit Court of Appeals has observed that:

> Our cases have established that the enterprise itself, broadly speaking, must be marked by a common purpose, but it is not necessary that every single person who associates with the entity gain some discrete advantage as a result of that particular motivation. Prospective benefit to an individual collaborator is simply impertinent; it is sufficient if a RICO defendant shared in the general purpose and to some extent facilitated its commission. *See United States v. Kragness*, 830 F.2d 842, 856 (8th Cir. 1987) (deeming this factor satisfied where each defendant shared common purpose and to some extent carried it out); *United States v. Lemm*, 680 F.2d 1193, 1199 (8th Cir. 1982) ("Each appellant shared with Eugene Gamst the purpose of setting arson fires so as to defraud one or more insurance companies, and each carried out this purpose to some extent."), *cert. denied*, 459 U.S. 1110, 103 S. Ct. 739, 74 L. Ed. 2d 960 (1983).

Handeen v. Lemaire, 112 F.3d 1339, 1351 (8th Cir. 1997).

Here, the court concludes that the members of the association-in-fact shared the common purpose of marketing HTA agreements to the Producers and to some extent carried it out. Thus, the court finds that the producers have adequately pled the common purpose element here. Therefore, this portion of ADM's motion is denied.

b. Pattern of racketeering

ADM also contends that the Producers have failed to allege a pattern of racketeering activity. Liability under RICO is premised upon conduct involving a "pattern" of racketeering activity. 18 U.S.C. § 1962; *Manion v. Freund*, 967 F.2d 1183, 1185 (8th Cir. 1992). Indeed, allegations regarding a "pattern of racketeering" have been described as "the heart of any RICO complaint." *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th

Cir. 1991) (quoting *Malley-Duff*). This pattern requirement is the primary source of RICO's unique character. *Granite Falls Bank*, 924 F.2d at 153.

Under RICO, a pattern of racketeering activity requires at least two predicate acts of racketeering activity, the last of which occurred within ten years of a predicate act previously committed by the defendant enterprise. 18 U.S.C. § 1961(5); *Manion*, 967 F.2d at 1185; *Diamonds Plus, Inc.*, 960 F.2d at 769.[16] Courts have noted that a RICO "pattern" has two characteristics, "relatedness" and "continuity." *Manion*, 967 F.2d at 1185-86; *Terry A. Lambert Plumbing, Inc. v. Western Sec. Bank*, 934 F.2d 976, 979 (8th Cir. 1991). Predicate acts are "related" if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Sedima*, 473 U.S. at 496 n.14. Continuity requires proof of "related predicates extending over a substantial period of time" or "involving a specific threat of repetition extending indefinitely into the future." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242 (1989) (noting that proof that predicate acts are "part of an ongoing entity's regular way of doing business" may suffice to meet "continuity" requirement).

The "at least two acts of racketeering activity" requirement found in § 1961(5) "is only a minimum requirement," and two might not be enough. *Diamonds Plus, Inc.*, 960 F.2d

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[16] Section 1961(5) contains the following definition of "pattern of racketeering activity,"

> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

18 U.S.C. § 1961(5).

at 769 (citing *H.J. Inc.*, 492 U.S. at 238). The requirements that the acts be related and amount to or pose a threat of continued criminal activity are also essential. *Id.* The Eighth Circuit Court of Appeals has noted that "[u]ltimately, the existence of a pattern is a question of fact." *Id.* (citing *Terry A. Lambert Plumbing*, 934 F.2d at 980).

ADM asserts that the Producers' pleadings fail to meet the continuity requirement. The continuity requirement involves primarily the court's examination of the length of time during which the conduct occurred. *Terry A. Lambert Plumbing*, 934 F.2d at 980; *Atlas Pile Driving Co.*, 886 F.2d at 994. The Eighth Circuit Court of Appeals has declined to determine what period of time is needed to establish continuity. *Terry A. Lambert Plumbing*, 934 F.2d at 980. Instead, the court has held that a period of "over three years" was sufficient, *Atlas Pile Driving Co.*, 886 F.2d at 994, but a single transaction, with only one victim, taking place over a short period of time fails to rise to the level of a "pattern of racketeering" sufficient to sustain a RICO claim. *Terry A. Lambert Plumbing*, 934 F.2d at 981. However, the Eighth Circuit Court of Appeals has recognized that a period of seven months may be sufficient, if the plaintiff can demonstrate the predicate acts constitute more than "sporadic crime." *Nabors*, 45 F.3d at 241. Thus, the "continuity" requirement is temporal, requiring "'a series of related predicates extending over a substantial period of time.'" *Manion*, 967 F.2d at 1185-86 (quoting *H.J. Inc.*, 492 U.S. at 242).

In *Lange v. Hocker*, 940 F.2d 359 (8th Cir. 1991), the Eighth Circuit Court of Appeals held that

> continuity can be shown in one of two ways--closed-ended continuity or open- ended continuity. "A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time." [*H.J. Inc.*, 492 U.S.] at 242, 109 S. Ct. at 2902. Where continuity cannot be established in such a manner, a RICO violation may be shown when a "threat of continuity is demonstrated." *Id.* (emphasis in original).

Lange, 940 F.2d at 361. Thus, in *Lange*, the court found that the plaintiff had failed to allege closed-ended continuity, by asserting predicate acts committed only within a few weeks of each other, while the plaintiff had failed to prove open-ended continuity, because the RICO defendants were no longer in a position with the alleged RICO enterprise to play a management role, precluding any "threat of continuity." *Id.* at 361-62; *see also Thornton v. First State Bank of Joplin*, 4 F.3d 650, 652 (8th Cir. 1993) ("While 'continuity' is both a closed- and open-ended concept," there is no continued criminal activity or threat of continued criminal activity from "predicate acts extending over a few weeks or months and threatening no future criminal conduct," quoting *H.J. Inc.*, 492 U.S. at 241-42; *McDonald v. Schencker*, 18 F.3d 491, 497 (7th Cir. 1994) (continuity is both a closed-and open-ended concept, citing factors for determining whether a closed period of predicate acts is sufficient to meet the continuity requirement). Thus, where, as here, the Producers have alleged predicate acts during a period of just over two years, from February of 1994, through May 26, 1996, the lengthy pattern of predicate acts alone "amounts to" continued criminal activity. *Diamonds Plus, Inc.*, 960 F.2d at 769 (stating continuity requirements in the alternative as conduct amounting to or threatening continued criminal activity); *Lange*, 940 F.2d at 361 (treating continuity requirement as provable in either of two ways: either by proving a closed-ended pattern of sufficient substance to amount to continued criminal activity, or by proving an open-ended pattern that poses a "threat of continuity"). If the misconduct has been sufficiently long-lived, and involved sufficient and sufficiently-related acts to constitute a pattern of, not just sporadic, criminal conduct, it meets the requirements of the statute. *H.J. Inc.*, 492 U.S. at 242-43. The court concludes that allegations of predicate acts here are pleaded with sufficient specificity to meet the pattern of racketeering activity requirements of RICO, at least to the extent necessary to defeat a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Therefore, this portion of ADM's motion to dismiss is also denied.

3. Vicarious liability under RICO

ADM argues that as a matter of law it cannot be held vicariously liable under RICO. *See Luthi v. Tonka Corp.*, 815 F.2d 1229, 1230 (8th Cir. 1987) ("We decline to apply the doctrine of respondeat superior to . . . RICO claims"). The Producers, however, argue that ADM is nonetheless liable under the doctrine of vicarious liability because ADM benefitted from its agents' actions.

In *Luthi*, the plaintiffs contended that the defendant should be held liable because its chief financial officer caused plaintiffs' financial loss by fraudulent acts relating to a purchase of various corporations owned by plaintiffs. *Id.* at 1229. The Plaintiffs asserted a claim against the defendant exclusively under RICO. The district court dismissed the complaint on the grounds that RICO did not impose vicarious liability on the defendant corporation. *Id.* In affirming, the Eighth Circuit Court of Appeals concluded that RICO did not apply because the doctrine of respondeat superior— one who is not at fault may be held vicariously liable for the wrongdoings of another—is contrary to the purposes of RICO:

> "The premise of respondeat superior is that one who is without fault may be held vicariously liable for the wrongdoing of another. W. Prosser, Law of Torts 458 (4th ed. 1971). As our previous discussion of direct liability reveals, we think the concept of vicarious liability is directly at odds with the Congressional intent behind section 1962(c). Both the language of that subsection and the articulated primary motivation behind RICO show that Congress intended to separate the enterprise from the criminal "person" or "persons". Indeed, there is unlikely to be a situation, in the absence of an express statement, in which Congress more clearly indicates that respondeat superior is contrary to its intent."

Id. at 1230 (quoting *Schofield v. First Commodity Corp.*, 793 F.2d 28, 32 (1st Cir. 1986)). A number of other federal circuit courts of appeal have also held that vicarious liability is generally inconsistent with the express terms of RICO. *See, e.g., Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 425 (5th Cir.), *cert. denied*, 498 U.S. 895 (1990); *Yellow*

Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 883 F.2d 132, 140 (D.C. Cir. 1989), *rev'd in part on other grounds*, 913 F.2d 948 (D.C. Cir. 1990) (*en banc*), *cert. denied*, 501 U.S. 1222 (1991); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1306 (7th Cir. 1987); *Schofield*, 793 F.2d at 30-32.

Luthi and *Schofield* and the other cases cited above, however, all involved the "non-identity" rule which requires that the defendant to a RICO suit must be a different entity than the "enterprise" plead under § 1962(c). *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1404 (11th Cir.) (explaining that under the non-identity rule "the RICO defendant and the RICO enterprise cannot be one and the same"), *modified on reh'g*, 30 F.3d 1347 (11th Cir. 1994), *cert. denied sub nom. USX Corp. v. Cox*, 513 U.S. 1110 (1995). This requirement stems from the statute's language, which distinguishes the "person" who is employed by or associated with the "enterprise," from the "enterprise" itself. *See Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840 (4th Cir. 1990). It is the "person," and not the "enterprise," that is subject to RICO liability. *Luthi* and *Schofield* and the other cases denying vicarious liability have been distinguished by subsequent courts in light of their specific concern about the non-identity rule. *See Crowe v. Henry*, 43 F.3d 198, 206 n.19 (5th Cir. 1995); *Davis v. Mutual Life Ins. Co.*, 6 F.3d 367, 379-80 (6th Cir. 1993), *cert. denied*, 510 U.S. 1193 (1994); *Brady v. Dairy Fresh Prods. Co.*, 974 F.2d 1149, 1154-55 (9th Cir. 1992); *see also Cox*, 17 F.3d at 1404-06 (holding that the Eleventh Circuit does not follow the non-identity rule, and noting that it would permit vicarious liability even if it did follow the non-identity rule). Instructive of these decisions is the Sixth Circuit Court of Appeals decision in *Davis v. Mutual Life Ins. Co.*, 6 F.3d at 379-80. In distinguishing *Luthi*, the Sixth Circuit Court of Appeals observed that:

> Three other circuits have, like the First Circuit, refused to impose vicarious liability under section 1962(c) of RICO, but we find their decisions no more germane. In *Luthi v. Tonka Corp.*, 815 F.2d 1229, 1230 (8th Cir. 1987), the Eighth Circuit

> refused, as a matter of law, to impute to the Tonka Corporation the alleged RICO violations of its chief financial officer. Citing *Schofield*, the court held that section 1962(c) does not permit vicarious liability, "particularly where the pleadings indicate that the principal was a victim of the individual's activities." *Id.* Here, the plaintiffs did not allege that Fletcher victimized MONY through his racketeering activity; instead, they alleged that MONY knowingly sponsored and benefited from the activity. *Luthi*, therefore, did not decide the question now before us.

Davis, 6 F.3d at 379-80.

Because ADM is the defendant here and is not named as one of the three enterprises in the Second Amended Complaint, the non-identity rule does not come into play. In similar cases in which the non-identity rule was not at issue, courts have permitted vicarious liability. *See Davis*, 6 F.3d at 379 (holding that RICO permits "the imposition of liability vicariously on corporate 'persons' on account of the acts of their agents, particularly where the corporation has benefitted from those acts."); *Brady*, 974 F.2d at 1154-55 (holding that an employer may be held liable under agency principles when it benefits from violations of § 1962(c) and is distinct from the enterprise); *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1361-62 (3rd Cir. 1987) (holding that where defendant was not RICO enterprise, "theories of respondeat superior and aiding and abetting liability are not out of place"). The court concurs with the reasoning of those federal courts that have permitted vicarious liability and concludes that it is appropriate for a court to assume that traditional rules of agency law apply to a federal statute when those traditional rules are consistent with the statute's purpose and Congress has not indicated otherwise. *See Schofield*, 793 F.2d at 33 (extent to which statute incorporates common law principles of agency liability depends on the extent to which the principles are consistent with the statute's language and purposes).

Here, the Producers seek to impose liability on ADM as a corporate "person." The

Producers have alleged that ADM's agents actively promoted the scheme involving HTA contracts and benefitted from it through the resultant increase in its corporate income. Under these well pled facts, the court concludes that ADM may be held vicariously liable under RICO for the alleged actions of its agents. Therefore, this portion of defendant ADM's motion is denied.

D. State Law Claims

1. Breach of fiduciary duty

ADM also seeks the dismissal of Count XI, the Producers' Iowa common law claim for breach of fiduciary duty. ADM asserts that the Producers have failed to plead facts sufficient to establish that ADM had a fiduciary duty to the Producers.

As this court has previously explained, the Iowa Supreme Court has defined a fiduciary duty as follows:

> "A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relationship." *Kurth v. Van Horn*, 380 N.W.2d 693, 695 (Iowa 1986) (citing Restatement (Second) of Torts § 874 cmt. a (1979)). We have also noted that
>
> > a confidential relationship "exists when one person has gained the confidence of another and purports to act or advise with the other's interest in mind. . . . The gist of the doctrine of confidential relationship is the presence of a dominant influence under which the act is presumed to have been done. [The][p]urpose of the doctrine is to defeat and protect betrayals of trust and abuses of confidence."
>
> *Hoffman v. National Med. Enters., Inc.*, 442 N.W.2d 123, 125 (Iowa 1989) (quoting *Oehler v. Hoffman*, 253 Iowa 631, 635,

> 113 N.W.2d 254, 256 (1962). . . .
> . . . . [W]e are cognizant of the fact that "[b]ecause the circumstances giving rise to a fiduciary duty are so diverse, any such relationship must be evaluated on the facts and circumstances of each individual case." *Kurth*, 380 N.W.2d at 696.

Oeltjenbrun, 3 F. Supp.2d at 1053 (quoting *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 138 (Iowa 1996), *cert. denied*, 118 S. Ct. 52 (1997)); *see also Corcoran v. Land O'Lakes, Inc.*, 39 F. Supp.2d 1139, 1154 (N.D. Iowa 1999) (quoting *Oeltjenbrun*); *Economy Roofing & Insulating Co. v. Zumaris*, 538 N.W.2d 641, 647-48 (Iowa 1995) (recounting indicia of a fiduciary relationship); *Anderson v. Boeke*, 491 N.W.2d 182, 188 (Iowa Ct. App. 1992) ("'A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relationship,'" quoting *Kurth*, 380 N.W.2d at 695, in turn quoting RESTATEMENT (SECOND) OF TORTS § 874 cmt. a).

As this court also explained in *Corcoran*,

> "Some of the indicia of a fiduciary relationship include the acting of one person for another; the having and exercising of influence over one person by another; the inequality of the parties; and the dependence of one person on another." *Irons v. Community State Bank*, 461 N.W.2d 849, 852 (Iowa Ct. App. 1990). Fiduciary duty arises, for example, between attorneys and clients, guardians and wards, and principals and agents. *Kurth*, 380 N.W.2d at 698; *accord Engstrand v. West Des Moines State Bank*, 516 N.W.2d 797, 799 (Iowa 1994) (citing *Kurth*)."

Corcoran, 39 F. Supp.2d at 1154 (quoting *Oeltjenbrun*, 3 F. Supp.2d at 1053); *accord Zumaris*, 538 N.W.2d at 647-48 ("A 'fiduciary relation' arises whenever confidence is reposed on one side, and domination and influence result on the other; the relation can be legal, social, domestic, or merely personal. Such relationship exists when there is a reposing of faith, confidence and trust, and the placing of reliance by one upon the judgment

and advice of the other.").

Here, it is alleged ADM's agents provided the Producers with advice about HTAs. Specifically, it is alleged that:

> FAC-MARC, Agri-Plan and CSA, having entered into agricultural consulting contracts which included recommendations for entering into HTA contracts and regulated commodity spreads. As a result, FAC-MARC, Agri-Plan and CSA, having agreed to act as Plaintiffs' agents, owed the following Plaintiffs who entered into such consulting contracts a fiduciary duty. . .In taking such actions, FAC-MARC, Agri-Plan, and CSA were acting in furtherance of the interests of ADM and subject to ADM's oversight and control, based upon which ADM also owed said plaintiffs the same fiduciary duty.
>
> 219. Furthermore, Agri-Plan, FAC-MARC and CSA, and therefore ADM, knew that as result of the superior knowledge and expertise of said Defendants, that said Plaintiffs were placing the utmost trust in these Defendants concerning the recommendations regarding initiation and rolling of the HTA contracts.

Second Amended Compl. at ¶ 218-219. Thus, the Producers allege their belief that ADM's agents knew that they were obligated to act with the interests of the Producers in mind. Remembering that the court must "take the well-pleaded allegations in the complaint as true and view the complaint, and all reasonable inferences arising therefrom, in the light most favorable to the plaintiff," *St. Croix Waterway Ass'n v. Meyer*, 178 F.3d 515, 518 (8th Cir. 1999), the court concludes that the allegations contained in the Second Amended Complaint are sufficient to allege a claim that ADM's agents occupied a fiduciary relationship with the Producers. Therefore, this portion of ADM's motion to dismiss is also denied.

2. Fraudulent Inducement

ADM further challenges the sufficiency of the Producers' pleadings with regard to their claim of fraudulent inducement (Count XIII). ADM again asserts that the Producers have failed to meet the pleading requirements of Rule 9(b). The elements of a tort claim

for fraudulent misrepresentation are: "(1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent; (6) justifiable reliance; and (7) resulting injury or damage." *Hyler v. Garner*, 548 N.W.2d 864, 871 (Iowa 1996); *accord McGough v. Gabus*, 526 N.W.2d 328, 331 (Iowa 1995). As noted above, the Eighth Circuit Court of Appeals has concluded that the Producers have pleaded fraud with particularity against ADM. Therefore, this portion of ADM's motion is denied.

3. Negligence

ADM further challenges the sufficiency of the Producers' pleadings with regard to their claim of negligence (Count XV). ADM asserts that given the pleadings it is unsure whether the Producers were asserting a claim of negligence against it or merely the Grain Elevator defendants. From the Producers' response, the court concludes that the Producers negligence claim is only asserted against the Grain elevator defendants. Therefore, this segment of ADM's motion to dismiss is granted and Count XV of the Second Amended Complaint is dismissed as to ADM.

IV. CONCLUSION

The court **grants in part and denies in part** ADM's motion to dismiss. The court concludes that the issue of whether the Producers have met the requirements of Federal Rule of Civil Procedure 9(b) is controlled by the Eighth Circuit Court of Appeals's August 16, 2000, decision. The court further concludes that the amended complaint does allege with particularity either the falsity of the alleged misrepresentations or ADM's knowledge or notice of such falsity. Similarly, the court concludes that the factual allegations contained in the Second Amended Complaint are sufficient to satisfy the pleading requirements of the federal rules with regard to causation. Next, with regard to ADM's argument that some of the CEA claims are barred by the CEA's statute of limitations, the court concludes that resolution of whether the circumstances presented in this case triggered

the running of the statute of limitations is a factually sensitive issue which cannot properly be resolved on a motion to dismiss. The court further concludes that, because the inquiry regarding these claims requires the court to examine "the intentions of the parties" and determine "whether the parties contemplated physical delivery," the question of whether the HTAs are futures contracts or cash forward contracts is a fact intensive issue that precludes determination on a motion to dismiss. Because the court has determined that the question of whether the HTAs are futures contracts or cash forward contracts is a factual issue, the connected question of standing also cannot be determined on a motion to dismiss. ADM's motion to dismiss is **granted** as to that portion of Count VI which is based on claims of excessive speculation because the court concludes that no private cause of action exists under the excessive speculation provisions found in 7 U.S.C. § 6a. With regard to ADM's argument that the portion of Count VI which is based on a violation of § 6o must be dismissed on the ground that the Producers have failed to adequately plead facts establishing that it is a "commodity trading advisor" under the CEA, the court concludes ADM may be held liable for the violations of CEA committed by its agent, FAC-MARC. ADM's motion is also **granted** with respect to the Producers' claims for punitive damages under 7 U.S.C. § 25(3)(b). ADM's motion is denied with respect to the Producers' RICO claims against it. Because the court concludes that the allegations contained in the Second Amended Complaint are sufficient to allege a claim that ADM's agents occupied a fiduciary relationship with the Producers, the court further denies ADM's motion with respect to Count XI. With respect to ADM's challenge to the sufficiency of the Producers' pleadings with regard to their claim of fraudulent inducement, the court finds that this issue is controlled by the Eighth Circuit Court of Appeals's conclusion that the Producers have pleaded fraud with particularity against ADM. Finally, ADM's motion is **granted** with respect to the Producers' claim of negligence found in Count XV because the Producers negligence claim is only asserted against the Grain elevator defendants.

IT IS SO ORDERED.

DATED this 13th day of February, 2001.

_____
MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA